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Elmer Huber and Roy Huber v. Deep Creek Irrigation Company et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ELMER HUBER and ROY HUBER,
Plaintiffs and Respondents,

vs.

DEEP CREEK IRRIGATION COMPANY, a corporation, OLLIE W. JUSTICE, ORLAND COOK, DARVALL COOK and BEN COOK,
Defendants and Appellants,

MOSBY IRRIGATION COMPANY,
Intervenor.

Civil No. 8430

Appellant's Brief

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TABLE OF CONTENTS

AUTHORITIES CITED

(Cases)

STATUTES CITED

Laws of Utah 1919

Utah Code Annotated 1953

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STATEMENT OF FACTS

This is an appeal from a judgment and decree entered by the District Court on the 19th of August, 1955. The judgment was entered by the Honorable William Stanley Dunford just a few hours before he died, and was probably his last official act as Judge. Because of that fact and because the Court Reporter who had reported the trial of the case left the State of Utah prior to the entry of judgment, it has taken somewhat longer

to get the record together on appeal than would normally have been required.

The action was originally commenced by the Plaintiffs against Defendants and Appellants on March 19, 1953, seeking to quite title to certain water rights claimed by Plaintiffs "as represented by Certificate of Appropriation No. 1477." Plaintiffs further sought an injunction against the Defendants and each of them "from using or interfering with the waters of Deep Creek whenever the use of interference by these Defendants would cause the flow thereof at the point of diversion of these Plaintiffs to recede below 6.28 cubic feet of water per second" (R. 2). Defendants filed an Answer and Counterclaim in which they denied that Plaintiffs were the owners of the right to the use of 6.28 Cubic Feet of water per second, admitted that Defendants have for many years last past used the water in Deep Creek and claimed that they have the right to such use. The Defendant Ollie Justice claimed that he had the right to use 1-5/7 second-feet of water as a paramount and superior right to any of the amounts which the Plaintiffs claim (R. 3-5). The Defendants further requested the Court to order a general adjudication of the rights to the waters flowing in Deep Creek under and pursuant to the provisions of Sec. 73-4-18 U.C.A. 1953 (R. 4).

Several motions were heard by the Court prior to the time of trial. The case was finally tried commencing August 3, 1954, at Vernal, Utah. On the morning of the trial Mosby Irrigation Company sought, and obtained, leave to intervene in the action pursuant to the stipulation of counsel for all the parties. The Court allowed

the Complaint in Intervention to be filed, but ruled that no matter with respect to the allegations therein contained would be heard or determined in the trial. All matters claimed therein were left for such decision as the Court might make as to the issue on a general adjudication of the right to the waters flowing in Deep Creek (Tr. 3-5).

Following the trial, and on November 6, 1954, the Court rendered a Memorandum Decision finding generally in favor of the Plaintiffs and against the Defendants although also ordering a general adjudication. Thereafter, on December 27, 1954, Plaintiffs filed a Motion to Reopen in order to present further evidence to the Court. This Motition was granted and a further hearing was held on April 12, 1955, following which the Court on August 19, 1955, rendered its Supplemental Memorandum Decision. In consequence of the Supplemental Decision of the Court, the Plaintiffs submitted Amended Findings of Fact and Conclusions of Law and Decree which, as stated above, were signed on September 12th.

STATEMENT OF POINTS

The Court's original Memorandum Decision (R. 15-28) brings out rather clearly one of the issues between these parties, which necessitates this appeal. The Plaintiffs rely wholly upon a Certificate of Appropriation No. 1477, issued to Moroni Gerber of Springville, Utah (Plaintiffs' predecessor in interest) by which the holder thereof is entitled to the use of 6.28 c.f.s. of water from Deep Creek, diverted through a headgate and canal known as the "Gerber Ditch," from April 1 to November

1 of each year for the purpose of irrigating 377 acres of land described in the Certificate of Appropriation. This Certificate is dated July 12, 1926, and shows the date of appropriation to be January 10, 1908. Plaintiffs contend that such Certificate is conclusive evidence of the right to the use of the amount of water therein stated, with the priority date of January 10, 1908. On the other hand, Defendant Ollie Justice has pending before the State Eengineer's Office an Application for Appropriation of 1-5/7 feet of water with the priority date of September 30, 1922, and the Defendants Cook have a Certificate of Appropriation with priority date of March 19, 1924, for 1 second-foot of water(Exhibit 2).

It is the contention of Appellants that because of the failure of Moroni Gerber to submit proof of his appropriation as required within the time provided by Section 56, Chapter 67, Laws of Utah, 1919 (which statute was in full force and effect at the time) he lost his priority date of January 10, 1908, and that his priority date was postponed until the date when his proofs were submitted. Thus, even though Appellants' applications are subsequent in time, they are entitled to have the benefit of such postponement of priority on Gerber's Application, which would give them superior rights over the Plaintiffs.

Another issue between the parties in this action, which was apparently overlooked or ignored by the trial Court in its Memorandum Decision, is as to whether the Plaintiffs and their predecessors in interest gave up some of their rights to the use of water contained in the Certificate of Appropriation No. 1477 by reason of

abandonment, nonuse, adverse use by Appellants, or by specific agreement between the parties.

A third and final point in connection with this appeal relates to the failure of the Court to make any finding as to the fact that the right of the Plaintiffs under Certificate No. 1477 is "supplementary to Application No. 644 for a total of 196.51 acres of the total of 377 acres to be served and limits the holder to a maximum of 3 acre feet of water per acre of land irrigated per annum." The Court in its Memorandum Descision noted that all water "in excess of these limitations belongs to other appropriators, or is public water." Notwithstanding such notation in the Memorandum Decision, the Court failed to make any finding of fact in respect to this point. It is Appellants' claim also that there is insufficient evidence in this case to show that Respondents are not exceeding the maximum of 3 acre feet of water per acre of land irrigated; and, therefore, there has been a failure to show that they are entitled to the use of the water.

Appellants' points, which will be argued in order, are as follows:

I

The Court erred in determining the priority date of the Gerber Certificate 1477 to be January 10, 1908.

II

The Court erred in failing to find that the right to the use of the water under Certificate No. 1477, has been limited by reason of abandonment, nonuse, or adverse possession on the part of Appellants, or by contract and agreement between the parties.

III

Respondents have failed to show the right to the use of any water under Certificate No. 1477 because they have failed to

show that the land to which it is appurtenant does not already carry the burden of water allocated, to-wit: 3 acre feet of water per acre of land irrigated per annum.

ARGUMENT

I

THE COURT ERRED IN DETERMINING THE PRIORITY DATE OF THE GERBER CERTIFICATE 1477 TO BE JANUARY 10, 1908.

The application of Moroni Gerber for appropriation of 6.28 second-feet of water to be used from April 1 to November 1 of each year, was filed in the Office of the State Engineer on January 10, 1908, (Application No. 1713). Thereafter from time to time extensions were granted for completing appropriation to and including July 31, 1923. Although the record in the Office of the State Engineer would indicate that some question might be raised with respect to several of the extensions of time given for completing appropriation, it is not the purpose of Appellants here to do so. Appellants contend that even though such extensions be conceded to be valid the final proof of appropriation was not made within the time required by law.

At the time Gerber was required finally to prove up on his alleged appropriation, Section 52, Chapter 67, Laws of Utah, 1919, provided "the construction of the works shall be diligently prosecuted to completion and the water applied to beneficial use, within the time fixed by the State Engineer, not exceeding 14 years from the date of the approval of the application." The record in the State Engineer's Office shows that Application No. 1713 was approved by the State Engineer on July

31, 1909. Thus, under the provisions of the above statute, final proof would have to be submitted on or before July 31, 1923, conceding that proper extensions of time were granted to the date. A letter from the State Engineer to Moroni Gerber extended the time for filing final proof to July 31, 1909 with the statement that "the law does not allow further extension beyond July 31, 1923."

A purported written proof apparently without being sworn to, was received in the Office of the State Engineer on July 30, 1923. However, no filing fees accompanied the papers nor did the written proof contain either maps, profile or drawings as required by law. Thereafter, under date of September 4, 1923, the State Engineer wrote to Mr. B. O. Colton, Jr. to the effect that the written proof of appropriation relative to Application No. 1713 had been received but "both your written proof and maps were due on July 31, 1923. In addition to the fee of $1.00 for examining and filing proof, there is a fee of $5.00 due for examining and filing maps, profile and drawings. Thirty days are allowed within which to submit the required maps and fees to this office." The record discloses that the fee of $1.00 was received on July 25, 1923 and that the fee of $5.00 was not received until October 20, 1923, at which time Mr. Colton wrote to the State Engineer to the effect that he was mailing, under separate cover, profile and drawings. Section 55, Chapter 67, Laws of Utah, 1919 sets out the nature of the statement to be made on completion of the work, and provides:

"Said statement shall be sworn to by the

applicant and by two disinterested witnesses, and shall be accompanied by a map, profile and drawings made by a reputable civil engineer which shall be made on tracing linen and shall show fully and correctly the location with reference to the United States land surveys; the nature and extent of the completed works; the natural stream or source from which and the place where the water is diverted; the place and manner of connecting with other works or streams; the ground and grade lines, the cross-sections and dimensions of the various forms of the diverting channel; the character of the materials moved and used in construction; the several appliances used to divert, measure and regulate the water; the character of all structures which cross, support or constitute the diverting channel or any part of it, and such other mater as will fully and correctly delineate the work done and conform to the general rules and regulations of the State Engineer's Office. The map, profile and drawings shall be certified to under oath, by the engineer who has made the same and by the applicant whose works they represent, said certificates to be substantially of such form as the State Engineer shall by general rule prescribe. As soon as proof of completion of the works has been accepted and approved, the State Engineer shall endorse such acceptance and approval upon the applicant's certificate of proof, which shall then be a record of the completion of the works to divert the water sought to be appropriated."

This section of the statute goes on to provide the penalty for failing to make proof as required as follows:

"Proof made subsequent to the date set for the completion of the works shall cause the postponement of the priority from the date of the original application to the date when the proof is

made and all applications subsequent in time shall have the benefit of such postponement of the priority; provided, that in case of works constructed by the federal government, the official plans, maps and specifications approved by the proper officer of the federal government shall be accepted as a full compliance with the requirements of this Section, relating to maps, profiles and drawings." (Italics added.)

It is evident from the foregoing quotation that the legislature considered the filing of the maps, plans and profiles to be as important as the filing of the affidavit of completion of the works; that without the filing of such maps, plans and profile the affidavit of completion of the works would not be complete. That applicant Moroni Gerber failed to comply with the provisions of the above section of the statute is evident from the files of the State Engineer's Office quoted above and from the further fact that such files indicate that under date of March 5, 1924 the State Engineer had to return the proof of appropriation for further correction. One of the defects noted by the State Engineer was that the application to appropriate was for 8 second-feet of water, while the proof submitted was for 6.5. In that connection, the applicant had assigned away more second-feet of water than his proof was for; and, therefore, the State Engineer commented the certificate would have to be issued to the assignees and not to the applicant or reassignments would have to be filed to clear up this matter. Another defect was that there had been no measurement of the water which must be given in the proof and shown on the map, and that such would have to be done. It is interesting to note that in answer to the above objection

by the State Engineer, Mr. Gerber in a letter dated March 25, 1924 (nearly a year after proof was required) pointed out that the water had not been measured and he would have to go out sometime later in the spring to make the measurement before he could submit the final proof of water filing No. 1713. Too, no blueprint of the map had been submitted as required. Thereafter, three further extensions of time were given by the State Engineer to prove up on the water until on July 12, 1926 the State Engineer issued the Certificate of Appropriation, said Certificate being 1477 for 6.28 second-feet of water to irrigate 196.51 supplemental acres and 180.49 primary acres of land.

Appellants contend that the provisions of Section 57, Chapter 67, Laws of Utah, 1919, which states that priority of an appropriation "shall be determined by the date of receiving the written application in the State Engineer's office, *except as provided in Sections 55 and 56 hereof*" in effect determine that because of Gerber's failure to conform to said Sections 55 and 56 the priority of his appropriation i s not, as against other appropriators on the stream, the date of approval of his written application. Section 57 (insofar as it is here applicable) appears now as Section 73-3-18, U.C.A. 1953, and Section 56 appears as Section 73-3-17, U.C.A. 1953. The fact that former Section 56 required the State Engineer to set forth the "date of appropriation" in the Certificate does not make such date conclusive upon the parties to this proceeding. Nor does the further provision that such Certificate "shall be prima facie evidence of the

appropriator's right to the use of the water in the quantity, for the purpose and during the time mentioned therein" justify the conclusion that the Certificate is unimpeachable.

Other statutory provisions making certain documents "prima facie evidence" of the facts therein recited have been held subject to attack by persons claiming adversely to the person holding under such certificate. Thus, a tax sale certificate which by statute has been made "prima facie evidence of the facts therein shown, and the regularity of all proceedings connected with the assessment, valuation, notice, equalization, levies, tax notices, advancement and sale of property therein described" may be attacked by a person claiming title as against a tax-title claimant. (See Section 59-10-36, U.C.A. 1953). In fact, the legislative declaration that the Certificate is "prima facie evidence" carries with it the limitation that it is not "conclusive evidence" of such facts.

In determining that Appellants could not go back of the Certificate, the lower court relied upon the decision of this Court in the case of *Warren Irrigation Company* vs. *Charlton,* 58 Utah 113, 197 P. 1030, where the determination was made under the facts of that case "to follow the rules and principles which control in cases involving the effect given to patents issued for public land." However, the court went to some length to distinguish the matter before it from the facts in *New Era Irrigation Company* vs. *Warren Irrigation Co.,* 48 Utah 544, 160 P. 1195. In the Charlton Case the contestant was a stranger in the matter and attempted to

show a better right in a third person in order to defeat the action, while in the New Era Irrigation Company Case both parties were appropriators (as they are here) seeking to establish a priority of right. The Court very aptly stated in the Charlton Case in distinguishing the New Era Irrigation Company Case that in the latter "all the parties before the court were claiming under alleged appropriations made under the laws of the state relating to the appropriation of water. Appellants stand in no such relation in the instant case."

We wish to point out that there is no public hearing held on the proving up of an Application for Appropriation of water; that no notice is published or given to other parties as in the case of proving up a patent on land under the Federal statutes. While the State Engineer is required to examine the Affidavit of Proof, which includes maps, profile and drawings, to make a determination as t o the actual appropriation of the water to a beneficial use and other compliance with statutory provisions, there is no discretionary act required in placing the "prima facie" date of appropriation on the certificate which he issues.

We respectfully submit that the trial court erred in refusing to allow Appellants to establish by the records and files in the State Engineer's Office that the priority date of the Gerber Certificate 1477 was not as it would otherwise appear to be the date of appropriation shown on the Certificate.

See, also *Chandler* vs. *Utah Copper Company,* 43 Utah 479, 135 Pac. 106 ,where the court held that the Certificate of Appropriation cannot prejudice prior

rights that have been acquired. In *Lake Shore Duck Club* vs. *Lake View Duck Club,* 50 Utah 76, 166 Pac. 309, the court after commenting that the purpose of the law is to endow an appropriator of water with all the insignia of private ownership, held:

> "The certificate is his deed; his evidence of title, good, at least against the state, for all it purports to be, and *good as against every one else who cannot show a superior right.*" (Italics added.)

Appellants seek in this case to show a superior right because of the defects in Respondents' "deed." Both Respondents and Appellants Justice and Cook claim right to use the water under permission from the State. If this were a case involving title to lands where the claimants derive title from a common grantor, it would be possible to show that what purports to be a date of conveyance on one deed was not in truth and in fact the correct date, or that the recording date was not the true recording date, even though another statute makes entries in public records "prima facie evidence" of the facts therein recited. (See, Section 78-25-3 and 78-25-4, U.C.A. 1953.)

II

THE COURT ERRED IN FAILING TO FIND THAT THE RIGHT TO THE USE OF WATER UNDER CERTIFICATE NO. 1477 HAS BEEN LIMITED BY REASON OF ABANDONMENT, NONUSE, OR ADVERSE POSSESSION ON THE PART OF APPELLANTS OR BY REASON OF CONTRACT AND AGREEMENT BETWEEN THE PARTIES.

The aerial phontograph (Exhibit "A") as well as the other exhibits and evidence of this case indicate that Deep Creek is a long winding channel originating at

some rather large springs several miles to the north and west of the property occupied by the parties to this litigation. In the early season of the year the channel carries a heavy run-off of waters from the Uintah Mountains many miles away. However, as the early run-off water, commonly known as the high water season, terminates, the only source of water in the channel is that which comes from the springs and what may percolate or seep back into the creek bed from the lands on either side by reason of irrigation or run-off water from floods or storms. A good description of the location of the lands of the respective parties to this litigation is found in a report by a Mr. Burton, a representative of the State Engineer's Office, who made a survey of the property in June of 1940. Mr. Burton's report, introduced in evidence pursuant to stipulation of counsel for the respective parties, contains the following:

> "On June 25, 1940, in company with Mr. Justice, I made a field examination relative to this Application. The Justice ranch is located 4 miles north and 1 miles east of the town of Lapoint. The ranch is a mile long and one-quarter miles wide with the creek running near its east boundary nearly the full length. Immediately upstream is the Parish ranch which has not been used to speak of since 1934 or 1935; however, farther upstream are two or three ranches that are fairly well irrigated. Downstream is the Cook ranch which is being used by the Cook family, and four or five miles downstream is the Gerber diversion. Attached is a sketch which may assist in conveying an understanding of the Justice problem.
>
> "Mr. Justice has two points of diversion, the first of which is approximately 100 yds. north of

his north line and the second is downstream approximately three-eighths of a mile. At the time of my visit, Mr. Justice was diverting all of the water reaching the first point of diversion, which I estimated to be 0.10 sec. ft., and at the second diversion the small amount that is available which it is necessary to store in the creek and upper part of the ditch during the day and released at night, with the result that one crop row is watered each night. The creek channel, the bed of which is sand and gravel, is dry from a point 150 ft. downstream from the second Justice diversion to a point 150 ft. downstream from the second Justice diversion to a point 150 ft. downstream from the first Cook diversion, a distance of approximately one-half mile. At the point mentioned below the first Cook diversion, the water begins to develop and increases most of the way to the second Cook diversion. This development appears to come largely from irrigation of the Justice field as is evidenced by considerable sloughing of the west bank of the creek and water seeping from this sloughed earth. Much greater quantities as a rule are available for diversion during the early part of the irrigation season, a part of which is stored in the subsoil and released more gradually to the creek. At the time of this visit I found the quantity of water at the Cook second diversion, so near as I could estimate it, equal to the amount being diverted by Mr. Justice at both of his diversions. I feel satisfied that if the Justice water were turned down the creek with the conditions as at present found, none of it would reach the Cook diversions in direct flow through the creek. Possibly a little would pass through the gravel after sinking, but much would be lost in evaporation, etc. If Mr. Justice were forced to leave his farm because of loss of this Application, there would be no return flow from his lands, and it

is doubtful under such circumstances if Mr. Cook would have any water with drought conditions as they now are.

"The first appropriation from Deep Creek was Application No. 1713 by Moroni Gerber, later transferred to a Mr. Huber. Under this right the water is used approximately 1 mile east and 1 mile south of Lapoint. During low water or seasons of small runoff, the water will not reach the Huber area. Many years ago a dispute arose between the Huber right and the rights upstream, and a meeting was held at which a verbal agreement was reached. This understanding provided that if there were water enough to reach the Huber ranch, none would be diverted by the upper users until the flow at this ranch had reach 6 sec. ft. When the water recedes so that delivery cannot be made to Huber, each owner of the upper rights may take all that reaches his point of diversion, provided he does not exceed his right. Mr. Justice said that this agreement had been honored by all until recent years when Cook began to use water any time that it is at his points of diversion."

It will be noted that this report refers to an agreement which the respective parties entered into several years before the investigation made by Mr. Burton. This agrement was testified to by the various parties to the action. Mr. Roy Huber remembered that the agreement was made in about 1929 (Tr. 89), while others testified that it was in the late 20's or the first part of the 30's. Mr. Huber further testified that the agreement entered into with Mr. Justice and the others concerning the use of the water in Deep Creek was in writing and signed (Tr. 107). As he recalled the agreement, it was to the effect that whenever the water would not reach

the Hubers those above were entitled to use all the water (Tr. 108).

The evidence further shows that whenever the original appropriators up the stream took all of the water out of Deep Creek (which they did when the high water season was over), that a Mr. W. S. Perry, who lived approximately two miles above Mr. Justice, would place a tight dam in the stream so that the natural flow of Deep Creek was shut off at that point. Thereupon, those lower down the stream, including two persons living between Mr. Perry and Mr. Justice would shut off the water by placing a tight dam across the stream.

Mr. Roy Huber testified that the only water which ran in the Deep Creek channel below the W. S. Perry diversion after the primary appropriators had shut off the stream was that which percolated back into the stream below the point at which Mr. Perry diverted the water; that some water did develop below the point of Mr. Perry's diversion (Tr. 90, 91); that approximately ¾ of a mile below Mr. Perry a Mr. Eli Smith diverted the water (Tr. 91). In being examined as to when the persons below Mr. W. S. Perry would divert all of the water in the stream, Mr. Huber testified that from 1929 (when he occupied the Moroni Gerber property) he observed that those persons down the stream would dam off the Creek at their points of diversion and take all of the water when Mr. W. S. Perry put a tight dam in the stream (Tr. 82). Mr. Huber, however, testified that when this was done that they would have to go up from time to time and take the dam out. Upon being examined as to when or any specific occasions that he might re-

member going up and taking out the dam, he testified that the only occasion he could remember was in May of 1954; (Tr. 88) although he did recall that every year after 1929 Mr. Justice and Mr. Cook would place a tight dam across the creek during the month of May or June (Tr. 95). He testified that no legal action was ever taken to restrain or prohibit Mr. Justice or Mr. Cook from putting a tight dam in the creek until 1948; (Tr. 96) that thereafter in 1951 the parties got together and signed an application or petition to the State Engineer to have a general adjudication of the water in Deep Creek; that he was one of the parties who signed such petition and Mr. Cook and Mr. Justice also signed it (Tr. 105). Mr. Huber further testified that he knew Mr. Justice claimed the right to use one and one-seventh second-feet of water and that Justice continued to grow crops on his land year after year; that the only way he did it was that when Mr. Perry shut off the creek up above that Mr. Justice would shut it off down below (Tr. 85, 86); that he knew when he moved onto his property in 1929 that Mr. Justice and Mr. Cook were using the water above him; that the first person using the water above Mr. Huber was the Defendant Cook, above him was Mr. Justice, then Mr. Parish, then Mr. Eli Smith, and above him Mr. W. S. Perry (Tr. 80); that the W.S. Perry property is now occupied by Mr. Don Simmons.

At the point of diversion where the Hubers take the water out of Deep Creek there appears to be a pashal flume, which was installed by a Mr. Leonard Horracks in 1951. Apparently no measuring device was located at the point of the Huber diversion prior to that time. When Mr. Horrocks put in the flume in June of 1951, he

did not measure the water that was coming down the creek at that time nor did he determine whether it was being diverted by any users up the creek (Tr. 25).

Mr. Floyd Perry, a witness for the Plaintiff, testified that he was the son of W. S. Perry; that he now occupies a place three miles upstream from the place previously occupied by his father (Tr. 28). That in low water he places a tight dam in the stream to dam off all of the water in the creek; that his predecessors in interest did the same thing as far back as 1908 (Tr. 20). On cross-examination he testified that the users along the creek all put in a tight dam at about the same time each year, which is the time that the water goes down and the high water ceases (Tr. 32); that when he was a boy he remembered his father used to shut the water off in the creek at his point of diversion, but that he didn't remember whether those below him did the same thing although he imagined they did (Tr. 33).

Mr. John W. Gerber testified that he is the son of Moroni Gerber and that he formerly lived on the Gerber property, now occupied by the Hubers; that when W. S. Perry took all the water out of the Deep Creek at the end of the high water season other persons down the creek would do likewise; that when the water was shut off from the creek it would be known to the Gerbers within an hour or two because the only water in the channel would be that which would seep and percolate back into the channel below the point of diversion by W. S. Perry (Tr. 46).

Mr. Eli Smith testified as a witness for the Defendants to the effect that he was one of the users of water

between the W. S. Perry place and the Justice place; that when he moved onto the creek he made a filing for water on Deep Creek, and it was his practice and custom when Mr. W. S. Perry above took all the water that he would do likewise (Tr. 113). He likewise recalled the agreement entered into between the parties to the effect that when the water would not reach the Hubers that the persons along the creek could put in a tight dam; that that was when the water got down to approximately a second-foot at the Huber point of diversion (Tr. 115). This occurred about the same time W. S. Perry put in a tight dam (Tr. 113). He further testified that the Hubers never came up the creek and interferred with the dams of the appropriators along the creek after W. S. Perry took all the water at his point of diversion.

Mr. Orlando Cook, one of the Defendants, testified that he was the son of Ben Cook who homsteaded the property now occupied by the Defendants Cook (Tr. 154); that his father moved onto the property in about 1922 at the time the Defendant was 12 or 13 years of age. He testified that he recalled learning of an agreement which his father and others had entered into in Vernal with respect to the use of the waters in Deep Creek after the high water season ended (Tr. 164); and that thereafter his father continued to divert all of the water out of Deep Creek and dammed the creek off completely when Mr. Perry dammed it off above; and that he was never interferred with on the part of the Hubers or others in that action (Tr. 165).

Mr. Donald Simmons testified that he now farmed both the W. S. Perry property and the Eli Smith prop-

erty (Tr. 266, 267). that since he occupied the Eli Smith property in 1946 it has been his custom to make a tight dam across the creek at the point of diversion for use on this property at the same time that he shuts off the water at the W. S. Perry diversion point (Tr. 267); that he puts in a tight dam "without regard to how much water is in the stream" because there wouldn't be much water there when it has receded so that the W. S. Perry diversion shuts off the creek flow (Tr. 268).

Mr. Ollie Justice, one of the Defendants and Appellants, testified at some length concerning the practice of placing tight dams across the creek when the high water ceased and the upper appropriators took all the water out of the creek. He further testified that he had over the years claimed the right to do so and that all of the parties below the W. S. Perry diversion had made it a practice (Tr. 197). He testified about the conference in Vernal; that prior thereto he had discussions with the Hubers and before them the Gerbers about the use of the water but neither had ever taken out his dams when he put them in the creek (Tr. 212). At the conference he claimed the right to use the water in Deep Creek after the high water had ceased; that he had the right to "use all the water at Deep Creek at that time, that came up below the Simmons' diversion" (Tr. 213); that at this conference it was agreed that "after it was shut off at the W. S. Perry place" he could have the water (Tr. 215). Thereafter Appellants followed that practice until they began having difficulty in 1948 when the Mosby Irrigation Company turned water down the creek and claimed appellants did not have the right to

have a tight dam (or any dam) in the creek during the summer months (Tr. 216-224).

On cross-examination Mr. Justice reaffirmed his testimony to the effect that when Mr. Perry dammed the water off tight, the agreement was that the others down the creek would do so likewise, "without regard to how much water was in the stream" (Tr. 238).

On the basis of the foregoing evidence Appellants contend that the lower court should have found as a fact that without regard to priority of appropriation, when the high water season was over and the original appropriators up the stream took the entire flow from the creek that appropriators below W. S. Perry diversion and above the Huber diversion were entitled to do so. Such a conclusion is justified on the basis of non-use by the Hubers over the years, abandonment of any right in the water after the high water season, adverse usage by Appellants Justice and Cook, and by reason of the agreement reached between the parties.

Section 73-1-4, U.C.A. 1953 provides that failure to use water for a period of five years shall result in a forfeiture of right. This is the same provision which was in effect in 1919. (Section 6, Chapter 67, Laws of Utah 1919.) In *Hamond* vs. *Johnson,* 94 Utah 20, 66 P. 2d 894, the court defined what constituted an abandonment and held that it was not necessary to have an abandonment to lose the right to the use of water under the statute:

> "A forfeiture for nonuser during the statutory time may occur despite a specific intent not to surrender the right. It is based, not upon an act done, or an intent had, but upon a failure to use the right for the statutory time."

Likewise, the Hammond Case determined that a person might obtain a right to the use of water by adverse possession. See, also, *Spring Creek* vs. *Zollinger,* 58 Utah 90, 197 P. 737; *Wellsville-East Field Irrigation Company* vs. *Lindsay Land and Livestock,* 104 Utah 448, 137 P. 2d 634.

The court found that when the flow of water in Deep Creek is so far depleted that it will not reach plaintiffs' fields defendants should not be enjoined from taking and using any of the waters." However, the court failed to find when that would occur. It is a well established principle of law that when the water cannot be placed to a beneficial use by a prior appropriator it may be used by another whose rights is junior in time. See, *Albion-Idaho Land Co.* vs. *Naf Irrigation Company,* 97 F. 2d 439; *U.S.* vs. *Caldwell,* 64 Utah 490, 231 P. 434. What the court should have done also was to find that by custom, usage and practice—if not actually by agreement—appropriators below the W. S. Perry diversion were entitled to the entire flow of Deep Creek when the water ceased to flow past the Perry diversion. Certainly Appellants had established their right so to do by their open notorious and adverse use of the water in such manner, prior to the 1939 amendment which in effect forbade acquisition of rights in such manner. See, *Riordan* vs. *Westwood,* 115 Utah 216, 203 P. 2d 922.

III

RESPONDENTS HAVE FAILED TO SHOW THE RIGHT TO THE USE OF ANY WATER UNDER CERTIFICATE NO. 1477 BECAUSE THEY HAVE FAILED TO SHOW THAT THE LAND TO WHICH IT IS APPURTENANT DOES NOT ALREADY CARRY THE BURDEN OF

WATER ALLOCATED, TO-WIT: 3 ACRE FEET OF WATER PER ACRE OF LAND IRRIGATED PER ANNUM.

The certificate of appropriation under which Respondents claim the right to use the water (Plaintiffs' Exhibit "D") reads in part as follows:

> "Said water to be used as a supplementary supply to Application No. 644 of the Whiterocks Irrigation Co. for 10.63 acres in the SW¼ SW¼, 36.87 acres in the NW¼ SW¼, 29.4 acres in the SW¼ SW¼ Sec. 14; 16.82 acres in the NE¼ NE¼, 38.05 acres in the SE¼ NE¼, 40.00 acres in the NE¼ SE¼, 24.74 acres in the SE¼ SE¼ Sec. 15, T. 5 S., R. 19 E., S.L.B. & M. T total of 196.51 acres and as a primary supply to irrigate the 180.49 acres balance under this appropriation.
>
> "This certificate does not entitled the holder to use to exceed 3 acre feet of water per acre of land irrigated per annum from all rights combined."

The trial Court decreed that Plaintiffs are the owners of 277/377ths of Certificate No. 1477, and thereby quieted in the Plaintiffs "the prior right to the use of 4.61 c.f.s., of 6.28 c.f.s." The Court made no determination as to which of the lands in question the water was appurtenant to or whether it was supplementary or primary. Nor did the Court make any finding or determination with respect to whether the land on which a portion of the water covered by the certificate is supplementary has already a sufficient and adequate supply for irrigation, to-wit: 3 acre feet of water per acre of land irrigated per annum. This issue was not presented to the lower Court because it did not appear at that time that it would be involved in the case. However, the Court's findings and decree are such that this matter now be-

comes important. The Plaintiffs having been awarded only a portion of the water covered by the certificate, it becomes very important to ascertain whether such water is supplementary or primary and with respect to what land.

CONCLUSION

By way of summary, Appellants respectfully urge that the Certificate of Appropriation is at most only "prima facie evidence" of the right to the use of water, including the date of priority; that in a dispute between two appropriators of water the matters contained in the Certificate may be challenged and evidence introduced to show that the same are not correct; that in the instant matter the evidence proffered on the part of the Defendants and Appellants conclusively shows that the priority date of Certificate No. 1477 is subsequent to the priority dates of Appellants Justice and Cook.

In any event, regardless of priority date, Appellants are entitled to use the entire return and seepage flow coming into Deep Creek after the high water season and after the original appropriators upstream have placed a tight dam in the creek. The matter should further be referred back to the lower Court for the purpose of determining what portion of the water decreed to Plaintiffs is primary or supplementary and determine if the burden of use is properly carried.

Respectfully submitted,

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